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IN THE UTAH COURT OF APPEALS

PAIGE CHRISTINE FARNSWORTH,

Petitioner and Appellee,

vs.

LOREN KELLY FARNSWORTH,

Respondent and Appellant.

Appellate No: 20110317-CA

APPELLANT'S REPLY BRIEF

APPEAL FROM A FINAL JUDGMENT OF THE
SEVENTH DISTRICT COURT OF EMERY COUNTY,
JUDGE DOUGLAS B. THOMAS.

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ARGUMENT

A. Alimony by income equalization is not permitted in this case because Husband is able to meet Wife's established need.

The financial condition and need of the recipient spouse is the primary consideration when a trial court determines alimony.¹ And the trial court abuses its discretion if it equalizes incomes even when a payor spouse has the ability to pay the payee spouse's established need.²

Here, Wife acknowledges that the trial court “did nothing more than” equalize the parties' standard of living.”³ Wife seeks to justify the equalization based on the discretionary language of UTAH CODE §30-3-5(8)(c-d). But (8)(c) doesn't make a difference in this case because there is no dispute about whether Wife's standard of living should be valued on the date of separation or the date of trial—it was the same both times. Most importantly, (8)(d) is inapplicable under the *Sellers* case, and others, because Husband can meet Wife's standard of living.

Wife also relies on the unpublished memorandum decision of *Christiansen v. Christiansen* for her proposition that Husband “created” a low standard of living

¹ UTAH CODE §30-3-5(8)(a)(i) (2011).

² *Sellers v. Sellers*, 246 P.3d 173, 175 (Utah Ct.App. 2010); *See Olson v. Olson*, 226 P.3d 751, 756 (Utah Ct.App. 2010); *See also Bingham v. Bingham*, 872 P.2d 1065, 1068 (Utah Ct.App. 1994).

³ *Brief of Appellee* at 7.

and so he cannot now hold Wife to her historical standard of living.⁴ But Wife misrepresents the importance and applicability of *Christiansen*. In explaining *Christiansen*, Wife cites to the appellate court's recitation of the trial court findings and then tries to bootstrap the comments on those findings into a holding.⁵ But the *Christiansen* court simply upheld the trial court's determination that the wife's standard of living was reasonable—it did not fault the husband for creating a low standard of living. Notably, in this case, the trial court blamed the home's disrepair on Husband but there was no evidence presented at trial demonstrating that he was solely responsible for the disrepair. In fact, Husband and Wife lived there for 22 years together and created a lifestyle together. That is the most important evidence of Wife's standard of living.

B. To determine facts based on witness credibility, a trial court must have competing facts to choose from.

Husband's initial brief contains his substantive argument regarding the trial court's unsupported factual findings. But two items presented by Wife require a short response.

First, Wife argues that the trial court findings should be upheld because they were based on "common knowledge" and were "judicially noticed". Notably, the trial court did not take judicial notice of any fact at trial. And, the trial court's

⁴ *Christiansen v. Christiansen*, 2003 UT APP 348.

⁵ *Brief of Appelle* at 11-13.

common knowledge does not give rise to specific facts to support its verdict in this case. Admittedly, common knowledge may permit a court to make mathematical calculations in some instances—i.e. changing the interest calculations from a 30-year mortgage to a 15-year mortgage. But common knowledge does not permit the Court to value a specific home or determine its specific cost of repair.

Next, Wife argues that the trial court was permitted to judge witness credibility. Agreed. But judging witness credibility also does not permit a trial court to craft specific facts when no evidence is presented. Credibility permits choosing between two facts—but not creating entirely new ones. Here, Wife acknowledges that she did not prove any costs to repair the home.⁶ Husband also did not present any costs to repair the home. The trial court did not have any evidence on that issue to compare and weigh.

C. A child's hobby expenses are not necessities and cannot be included in a child support or alimony award.

After Husband filed his initial brief in this case, the Court issued its opinion in *Davis v. Davis*.⁷ In that case, the trial court required the husband to pay for ½ of all private school expenses for his children, in addition to child support. This Court reversed, explaining that the legislature has carved out only two categories

⁶ Wife notes that her counsel tried to submit an appraisal of home repairs but it was not allowed into evidence because it was hearsay. But more accurately, Wife's appraisal was allowed into evidence but her estimate of repairs was not allowed into evidence.

⁷ *Davis v. Davis*, 2011 UT App 311.

of expenses, in addition to child support, that parents are required to pay for their children—work-related childcare expenses and the children’s medical expenses. All other expenses for the children are part of the child support award.⁸

Wife asserts that alimony can include the hobby expenses for the minor child because the parties had historically paid those expenses. Thus, to include the expenses maintains Wife’s historical standard of living. But Wife fails to cite any relevant authority in support of her argument, instead referencing one inapplicable case on divorce modification and one case on property division.

More importantly, Wife’s brief is misleading in its explanation of the testimony presented at trial. She asserts that the hobby expenses will continue as part of Wife’s expenses after the child is over 18.⁹ She also asserts that the alimony award in this case was not specific to any particular expenses.¹⁰ But the testimony at trial does not support either statement. The trial court awarded \$200/month specifically to reimburse Wife for the hay and feed that the minor child required to raise pigs and feed two horses. (R. 139:121). The trial court’s Findings of Fact and Conclusions of Law also indicate the \$200/month was specifically attributable to the child’s hay and feed expenses. (R. 091:6). Furthermore, there was no specific testimony at trial that the feed and hay expenses

⁸ *Id* at ¶ 17.

⁹ *Brief of Appelle* at 19, ¶ 2.

¹⁰ *Brief of Appelle* at 19-20.

would continue after the child graduated. Notably, the trial court referenced an adult daughter's hay expenses and refused to award Wife alimony for those expenses. (R. 139:121; R. 091:6).

Ultimately, because the hobby expenses are not necessities, they cannot be included in a child support order. The trial court was not permitted to avoid that limitation by including those expenses as alimony for Wife.

CONCLUSION

Husband, Kelly Farnsworth requests that this Court reverse the trial court's alimony order and remand for a reduction of monthly alimony. He also requests his costs on appeal.

SUBMITTED this 7 day of November, 2011.

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CERTIFICATE OF SERVICE

On the 7 day of November, 2011, I served two copies of the foregoing *Appellant's Reply Brief* on all interested parties as follows:

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